No. 83-168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CONSTRUCTION AND GENERAL LABORERS UNION LOCAL 304 AND ALAMEDA BUILDING AND CONSTRUCTION TRADES COUNCIL
Petitioners,

v.

PAUL E. IACONO STRUCTURAL ENGINEER, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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PAUL E. IACONO STRUCTURAL ENGINEER, INC.

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QUESTION PRESENTED

Have the Petitioners stated any ground for the issuance of a Writ of Certiorari authorized by Rule 17 of the United States Supreme Court Rules in their request that this Court hold that the District Court abused its discretion in ordering disqualification of Petitoners' law firm, which employed a former government attorney without any screening measures and without obtaining the consent of the government, while at the same time this firm represented the Petitioners in a civil action arising out of a matter in which the government attorney had substantial responsibility while with the government?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff in this action and Respondent before this Court is Paul E. Iacono Structural Engineer, Inc., a California corporation.[1] The Defendants-Petitioners are Construction and General Laborers Union Local 304 and Alameda Building and Construction Trades Council, both labor organizations.

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[1]Paul E. Iacono Structural Engineer, Inc. has no parent or subsidiary corporations (Supreme Court Rule 28).

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OPINION BELOW

The opinion rendered by the Court of Appeals for the Ninth Circuit is set forth as Appendix A to the Petition for Writ of Certiorari (hereinafter "Appendix A"). The Magistrate's recommendation re disqualification of counsel, which was adopted by the United States District Court for the Northern District of California, is not reported and is set forth as Appendix B to the Petition for Writ of Certiorari (hereinafter "Appendix B").

JURISDICTION

The jurisdiction of this Court and of the Court of Appeals is correctly set forth in Petitioners' Brief for Writ of Certiorari (hereinafter "Petitioners' Brief").[2]

REGULATIONS INVOLVED

This case involves Canon 9 and Disciplinary Rules 5-105(D) and 9-101(B) of the American Bar Association Code of Professional Responsibility, as set forth in Petitioners' Brief.

STATEMENT OF THE CASE

A. Procedural Posture And Disposition In The Trial And Appellate Courts.

On May 5, 1978 Plaintiff-Respondent Paul E. Iacono Structural Engineer, Inc. (hereinafter "Iacono" or "Plaintiff" or "Respondent") filed its Complaint for Damages and Declaratory Relief against several defendants, in-

[2]In *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 372, n.8 (1981), this Court left open the issue of whether orders disqualifying counsel were appealable under 28 U.S.C. § 1291 as a *Cohen* collateral order. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949).

The Ninth Circuit has held that an order granting disqualification of counsel is appealable. *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation*, 658 F.2d 1355 at 1356-58 (9th Cir. 1981) *cert. denied*, 455 U.S. 990 (1982). Other circuits are in accord; *Cossette v. Country Style Donuts, Inc.*, 647 F.2d 526 (5th Cir. 1981); *Board of Education v. Nyquist*, 590 F.2d 1241 (2d Cir. 1979); *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020 (5th Cir. Unit B 1981), *cert. denied*, 454 U.S. 895 (1981); *Aetna Casualty & Surety Co. v. United States*, 570 F.2d 1197, 1200 (4th Cir. 1978), *cert. denied*, 439 U.S. 821 (1979); *Richardson v. Hamilton International Corp.*, 469 F.2d 1382 (3rd Cir. 1972), *cert. denied*, 411 U.S. 886 (1973); *Community Broadcasting of Boston, Inc. v. F.C.C.*, 546 F.2d 1022, 1025, n.12 (D.C. Cir. 1976).

cluding, *inter alia,* the Construction and General Laborers Union, Local 304 and the Alameda Building and Construction Trades Council (hereinafter "Defendants" or "Petitioners"). Presently only these two Defendant labor organizations remain in this action. Iacono is seeking damages from the Petitioners as a result of their illegal secondary picketing of Plaintiff's Pleasanton, California construction site in the spring of 1978. Iacono's claims are based on Section 303 of the Labor-Management Relations Act (LMRA) (29 U.S.C. § 187), which permits any person "injured in his business or property," as a result of a secondary activity in violation of Section 8(b)(4) of the National Labor Relations Act (29 U.S.C. § 158(b)(4)), to bring suit to recover damages sustained (Appendix A, pp. 3-5). The matter was assigned to Magistrate Frederick J. Woelflen pursuant to 28 U.S.C. § 636(b)(2)(C).

On April 23, 1981, Iacono filed a Motion for an Order Disqualifying the law firm of Van Bourg, Allen, Weinberg & Roger (hereinafter the "Van Bourg Law firm"). After hearing and upon consideration of supporting papers filed by both parties, Magistrate Woelflen issued a Recommendation that the Van Bourg law firm be disqualified. On June 26, 1981, the Honorable William H. Orrick, United States District Judge for the Northern District of California, approved Magistrate Woelflen's Recommendation Re Disqualification of Counsel and ordered that the law firm be disqualified from any further representation of the Defendants in this case (Appendix B).

The Ninth Circuit affirmed the District Court's disqualification order in a lengthy opinion filed on May 3, 1983 (Appendix A). On August 1, 1983, Petitioners filed a Petition for Writ of Certiorari with this Court to which the instant pleading is addressed.

B. Statement Of The Facts.

The District Court's Order disqualifying the Van Bourg law firm (which was affirmed by the Ninth Circuit) is based upon the fact that one of the attorneys employed by that law firm, Paul Supton, previously served as a staff attorney for the National Labor Relations Board ("NLRB") and, while employed by the NLRB, was actively involved in the investigation and disposition of unfair labor practice charges filed by Plaintiff against the Defendants. These unfair labor practice charges form the basis for the instant lawsuit for damages under Section 303 of the LMRA. While handling Plaintiff's unfair labor practice charges, Supton took a number of affidavits from key employee witnesses of Iacono. These affidavits described in detail interruptions in work at the jobsite caused by Defendants' secondary picketing and distribution of leaflets at Plaintiff's jobsite. These statements were taken by Supton with a pledge that they would be kept confidential unless produced at a hearing or trial.[3]

During the course of Supton's investigation, he had numerous discussions with the Plaintiff's attorney regarding the Plaintiff company and all aspects of the illegal secondary activity by the Defendants.

Supton had primary responsibility for settlement discussions which were held in one of these unfair labor practice cases (Appendix A, pp. 3-5).

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[3]The record is unclear as to whether all these statements were ever made public. NLRB statements are not recoverable prior to trial under the Freedom of Information Act or by request of opposing counsel. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); NLRB Rules and Regulations, Section 102.117. Moreover, Supton undoubtedly received information in confidence from Plaintiff, Plaintiff's counsel and other witnesses which was not set forth in the written statements.

As a result of Supton's involvement in these unfair labor practice cases, he gained an extensive knowledge of the facts of the present case, and such information would be relevant to the resolution of Plaintiff's Section 303 action.

Supton joined the Van Bourg law firm in August 1980. While Defendants disavowed any involvement by Supton in the instant case since he joined the Van Bourg law firm, he was present (although he did enter a formal appearance) at a status conference at which the background of this litigation was discussed.

At the time he was hired, the Van Bourg firm did not inquire of Supton as to the possibility of conflicts of interest based upon his NLRB experience (Appendix A, p. 29). The law firm did not prohibit discussions between Supton and other Van Bourg attorneys with regard to the Iacono matter, or otherwise take any measures, formal or informal, to isolate Supton from the Van Bourg attorneys working on the Iacono matter in order to ensure that Supton's knowledge would not intentionally or accidentally be disseminated to other members of the firm. Nor was he excluded from all financial reward from the case that might be reflected in year-end bonuses or the like (Appendix A, pp. 6-7). The law firm made no effort to contact the NLRB office where Supton had been employed to discuss any possible conflict of interest.

SUMMARY OF ARGUMENT

Petitioners have stated no valid reason for certiorari to be granted under the criteria set forth in Rule 17 of the United States Supreme Court's Rules (hereinafter "Supreme Court Rule 17"). As this Court and others have long recognized, it is the District Court which has primary responsibility for controlling the conduct of attorneys

practicing before it. Consequently, an Order disqualifying counsel will not be disturbed if the record reveals "any sound basis" for the Court's action (see cases *infra*).

In the United States District Court for the Northern District of California, attorneys' conduct is regulated by the State Bar Act of California and the Rules of Professional Conduct of the State Bar of California (following the California Rules of Court), as well as by the American Bar Association Code of Professional Responsibility (hereinafter "ABA Code") (Appendix A, pp. 15-16). Despite the fact that both the state ethical rules and the ABA Code prohibit continued representation by the Van Bourg law firm under the circumstances present here, Petitioners have nonetheless asked this Court to rewrite the ABA Code and to make this new Code binding upon all federal practitioners. Petitioners state "this case virtually screams out for this Court to exercise its supervisory powers to articulate standards for the vicarious disqualification of an entire law firm which has employed a former government attorney" (Petitioners' Brief, p. 18). In asking this Court to rewrite the ABA Code so as to create a new ethical rule on vicarious disqualification heretofore never adopted by the ABA or any court, Petitioners have apparently misconstrued the function of this Court as articulated in Supreme Court Rule 17.

Plaintiff is anxious to bring its case to trial as soon as possible. The granting of Defendants' petition would create further needless delay which would prejudice Plaintiff upon trial of this matter. For the foregoing reasons, Defendants' Petition for Writ of Certiorari should be denied in its entirety.

ARGUMENT AT LAW

A. The District Court Did Not Abuse Its Discretion In Ordering The Disqualification Of The Van Bourg Law Firm, Based On DR 9-101(B) and DR 5-105(D) Of The ABA Code Of Professional Responsibility.

The primary responsibility for controlling the conduct of Lawyers practicing before the District Court lies with that Court. As this Court recognized in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 377 (1981), decisions regarding disqualification of counsel are particularly within the ambit of the District Court judge, as each such decision "ordinarily turns on the particular factual situation of the case then at hand . . . ."

Accordingly, it has long been held that an order disqualifying counsel will not be disturbed if the record reveals "any sound basis" for the court's action. *Gas-A-Tron of Arizona v. Union Oil Co. of California,* 534 F.2d 1322, 1325 (9th Cir. 1976), *cert. denied,* 429 U.S. 861 (1976); *In re Taylor,* 567 F.2d 1183, 1191 (2d Cir. 1977); *Coffelt v. Shell,* 577 F.2d 30, 32 (8th Cir. 1978); *United States v. Dinitz,* 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied,* 429 U.S. 1104 (1977); *Fred Weber, Inc. v. Shell Oil Co.,* 566 F.2d 602, 605 (8th Cir. 1977), *cert. denied,* 436 U.S. 905 (1978).

In the instant case, the Ninth Circuit properly determined that the District Court did not abuse its discretior in ordering the disqualification of the Van Bourg law firm Petitioners apparently concede that Supton's individua disqualification was required under Disciplinary Rul

9-101(B) of the ABA Code (hereinafter "DR____").[4] Curiously enough, Petitioners do not actually argue in their Brief that the District Court abused its discretion in ordering the disqualification of the Van Bourg law firm based upon Disciplinary Rule 5-105(D) of the ABA Code.[5] Rather, Petitioners ask this Court to rewrite the ABA Code by fashioning a new ethical rule not heretofore accepted by any court in this country, and contrary to the ABA opinions in this area. Petitioners would have this Court rewrite DR 5-105(D) of the ABA Code so as to allow continued representation of a law firm in cases where DR 9-109(B) was violated, even if that firm took no measures to screen the former government attorney from either legal or financial involvement in the matter.

Formal Opinion No. 342 of the ABA Commission on Professional Ethics, Opinions (1975), reprinted in 62 ABA J. 517, 521 (1976), suggests that in certain cases disqualification of a firm can be avoided if proper screening procedures are followed. That opinion suggests that if the government agency is satisfied that the screening measures will effectively isolate the individual lawyer from participating in a particular matter and sharing in the fees attributable to it and there is no appearance of significant

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[4]Disciplinary Rule 9-101(B) states "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." Canon 9 of the ABA Code states "a lawyer should avoid even the appearance of professional impropriety."

[5]Disciplinary Rule 5-105(D) provides "if a lawyer is required to decline employment or to withdraw from employment under a disciplinary rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment."

impropriety affecting the interests of the government, the government may waive the disqualification of the firm which would otherwise be required under DR 5-105(D). Most courts, including the Ninth Circuit, have never approved of the screening procedures suggested in ABA Opinion No. 342. *Trone v. Smith*, 621 F.2d 994, 999, n. 4 (9th Cir. 1980); *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311, 1321 (7th Cir. 1978), *cert. denied*, 439 U.S. 955 (1978); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706, 711 (7th Cir. 1976); *Handelman v. Weiss*, 368 F.Supp. 258 (S.D.N.Y. 1973); *Fund of Funds, Ltd. v. Arthur Andersen Co.*, 435 F.Supp. 84, 96 (S.D.N.Y. 1977), *aff'd in part, rev'd in part*, 567 F.2d 225, 229, n. 10 (2d Cir. 1977); *In re Asbestos Cases*, 514 F.Supp. 914, 924-25 (E.D. Va. 1981).

As noted in Petitioners' Brief, several courts have approved of the screening and waiver method suggested by Opinion No. 342. *See Armstrong v. McAlpin*, 625 F.2d 433, 442 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981); *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam). However, as correctly noted by the Ninth Circuit in its decision (Appendix A, p. 28), the issue of whether firm-wide disqualification would have been necessary if a screening procedure as suggested in Opinion No. 342 had been used is not before this Court, as Petitioners have admitted that no such screening procedures were used in this case. In fact, a Van Bourg attorney stated that at the time Supton was hired the firm made no effort to determine what matters Supton had handled or had been in contact with while at the NLRB, and that the firm "never asked about what was learned at a prior employment" (Appendix A, p. 29). There is no evidence in the record of any specific measures the Van Bourg firm took to avoid either inadvertent or intentional disclosure of information concerning Supton's involve-

ment with the case (Appendix A, pp. 25-29). The Van Bourg firm did not even discuss the potential conflict of interest with Supton's former employer (the NLRB), let alone receive a waiver from the NLRB after enacting screening measures. Moreover, Supton was present at a status conference during which this litigation was discussed (Appendix A, p. 34). In sum, since the screening and waiver procedure suggested in Opinion No. 342 (and used in the cases cited by Petitioners on pages 11-12 of their Brief) was not utilized by the Van Bourg law firm, this Court need not consider the propriety of such procedure.

Petitioners would have this Court believe that the "overwhelming weight of authority" is contrary to the Ninth Circuit's decision affirming firm-wide disqualification. (Petitioners' Brief, p. 8). Nothing could be further from the truth. In fact, Petitioners have failed to cite a single case in which continued representation was permitted under circumstances such as those found here. The two cases relied upon by Petitioners in which firm-wide disqualification was not ordered are wholly inapposite because in these cases an adequate screening procedure had been used. In *Kesselhaut v. United States*, 555 F.2d 791, 793 (Ct. Cl. 1977) (per curiam), detailed screening procedures were immediately put into place upon the employment of the former government attorney, which included the exclusion of the former government attorney from all connection with the case, the denial of access to the files, and a salary scheme for the attorney which included no participation in the firm's earnings. Moreover, in *Kesselhaut*, the former government attorney had held a high level supervisory position while with the government, which provided him with only a peripheral knowledge of the case. In contrast, Supton was intimately involved in and had substantial responsibility for the NLRB cases which form the basis of the instant action.

Similarly, in *Armstrong v. McAlpin*, 625 F.2d 433, 442 (2d Cir. 1980), *vacated on other grounds*, 449 U.S. 1106 (1981) (also distinguished by the Ninth Circuit, Appendix A, pp. 43-44), the strict screening procedures which were implemented included exclusion from participation in the action (including an exclusion from remuneration based on fees from the case), the absence of access to relevant files, and a rule against discussion of the case in the presence of the ex-government lawyer. The *Armstrong* case is further distinguishable from the case at bar after even a cursory examination of the factual context in which the disqualification motion arose. There, the issue was the propriety of the disqualification of a law firm attempting to represent the receiver for a corporation which had been the subject of a Securities Exchange Commission ("SEC") fraud action. A disqualification motion had been brought based upon the fact that an attorney employed by the law firm had previously been an assistant director with the SEC and had high-level supervisory responsibility over the fraud action. In contrast to the instant case, the SEC's interests were squarely aligned with those of the subject law firm, as part of the receiver's obligation was, like the SEC, to institute legal action against the corporation. Accordingly, all of the SEC's files had been turned over to the receiver long before the former government attorney had been hired. The *Armstrong* case does not even suggest that continued representation of the firm would have been appropriate under the circumstances found here.

In sum, there is no authority whatsoever to support the rule which Petitioners would have this court fashion, i.e., that vicarious disqualification is not required even if the recommendations found in ABA Opinion No. 342 are not followed.

In addition to being in conformity with case law in the area, there are sound policy reasons in support of the District Court and Ninth Circuit's rulings below. Disciplinary Rule 9-101(B) of the ABA Code commands "a lawyer shall not accept private employment in a matter in which he had substantial responsibility while he was a public employee." The policy reasons for disqualifying a former government attorney who participated in the same manner while in government service are expressed in Opinion No. 342 of the ABA Ethics Committee, *supra.* Opinion No. 342 identifies these concerns as follows: (1) The treachery of switching sides, (2) the safeguarding of confidential information from future use against the government, (3) the need to discourage government lawyers from handling particular assignments in such a way as to encourage their own future employment and (4) the professional benefit derived from avoiding the appearance of impropriety. Formal Opinion No. 342 of the ABA Committee on Professional Ethics, Opinions (1975) reprinted in 62 ABA J. 517, 521 (1976).

Furthermore, it is also well established that Supton need not actually have disclosed any information in order for the Van Bourg law firm to be disqualified This is based upon the principle that it is the possibility of the breach of confidence, not the actual breach, which is significant. *Trone v. Smith, supra,* 621 F.2d at 999; *General Motors Corp. v. City of New York,* 501 F.2d 639 (2d Cir. 1974); *Telos, Inc. v. Hawaiian Telephone Co.,* 397 F.Supp. 1314 (D. Hawaii 1975).

Disciplinary Rule 5-105(D) (which requires the vicarious disqualification of an entire law firm if one attorney is disqualified) is also based upon sound policy reasons. This rule has been said to reflect the normally close personal and financial relations among members of a law firm and

the ease of communications among them. It has also been attributed to the concept that since all members of a law firm share in the ethical obligation to any member's client, all the firm's members should be subject to common ethical restrictions. Lacovara, P., *Restricting The Private Practice Of Former Government Employees,* 20 Ariz. L. Rev. 369, 379 (1978). In addition, the concept of "imputed knowledge" also normally operates to attribute to an attorney the confidences and secrets held by other attorneys in his firm. As is stated in *In re Asbestos Cases, supra,* 514 F.Supp. at 922:

> Because of the continuing danger that an attorney may unintentionally transmit information gained through the attorney's prior association due to the day-to-day contact an attorney has with other members of his firm, disqualification is required to guard against the possibility of inadvertent use of confidential information. This disqualification is required without showing that an attorney possessed explicit confidences which were expressly transmitted to or received by the other members of the law firm during some conference, letter-drafting or phone conversation and is required whether or not the other members of the firm are actually exposed to the information. The threat remains that the firm may have been tainted by the improper receipt of privileged information and it is the possibility of the breach of confidence, not the fact of the breach that triggers disqualification.

[Citations omitted.]

Moreover, that hardship might result from the disqualification of the Van Bourg law firm in the instant case is not an excuse for their failure to adhere to Canon 9 of

the ABA Code and Disciplinary Rule 9-101(B). As is stated in *In re Asbestos Case, supra,* 514 F.Supp. at 925-26:

> The Court acknowledges the hardship claimed by Greitzer and Locks [the disqualified law firm] in disqualifying it from participating further in the Norfolk litigation. This hardship quite properly rests with the firm which knowingly undertook the employment of an individual in the face of the Code's clear prohibition, without first securing a Government waiver and seeking approval of the screening procedures from this Court.[6]

In the instant case, Iacono's motion for disqualification was not designed to produce further delay in this action. Iacono has the burden of proving its damages at trial, and hence any harm that might result from delay as a result of these disqualification proceedings would probably be felt most keenly by Iacono should the passage of time impair the parties' ability to obtain witnesses and elicit testimony from them at trial. Iacono is anxious to press this case to trial to recover the damages to which it is entitled. Iacono brought its motion because it believed strongly that it is entitled to a trial free from even the taint of possible impropriety on the part of the Van Bourg law firm. Should this frivolous Petition for Certiorari be granted, considerable unnecessary delay will once again be caused by the appeal process. The Court would be greatly prejudic-

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[6]In *In re Asbestos Cases,* 514 F.Supp. 914 (E.D. Va. 1981), the district court held that an attorney who was involved in asbestos litigation while he worked for the government was disqualified (along with the rest of his law firm) from representing plaintiffs in related private asbestos litigation despite attempts of the firm to screen him from any participation in the litigation.

ing Plaintiff for no valid reason if it were to grant this Petition.

CONCLUSION

It has been said that in disqualification situations doubts are to be resolved in favor of disqualification. *Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2d Cir. 1975); *In re Coordinated Pretrial Proceedings In Petroleum Products Antitrust Litigation, supra,* 658 F.2d at 1359 (9th Cir. 1981).

Petitioners have not articulated a valid ground under Supreme Court Rule 17 that would warrant the granting of their Petition for Certiorari. There is no conflict among the Courts of Appeal in this area, as suggested by Petitioners, since the Van Bourg law firm took no screening measures when hiring Supton, and did not obtain a waiver from the NLRB. Petitioners' request that this Court rewrite the ABA Code in a fashion heretofore not accepted by any court or by the ABA does not set forth valid grounds for the granting of their Petition for Certiorari. Accordingly, the Petition must be denied.

DATED: August 30, 1983

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